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CONCEALMENT OF PROPERTY BY OFFICERS OF BANKRUPT CORPORATION NOT PUNISHABLE.

In the case of Field v. United States, 14 Am. B. R. 507, a case arising in the United States District Court for the Western District of Arkansas, Judge Sanborn has rendered what seems to us to be an extraordinary decision. It seems that one Field was the vice-president and one of the directors of Brown-Rollosson Company, a bankrupt corporation. He was indicted under section 29b of the Bankrupt Law of July 1, 1898, ch. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), and convicted of the offense of having knowingly and fraudulently concealed property which belonged to the estate of the corporation in bankruptcy from its trustee. Section 29b reads: "A person shall be punished by imprisonment for a period of not to exceed two years on conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee, any of the property to his estate in bankruptcy."

The court in setting aside the conviction in the principal case, says: "Neither the offense nor the punishment here described exists under the common law. They are the creatures of the act of congress. In the absence of that act, no one could be legally punished by imprisonment for having concealed property from his trustee in bankruptcy. In the presence of the act, therefore, no one can be lawfully punished by imprisonment for this concealment who is not by the terms of the statute subject to this punishment. The act specifically designates the persons liable to the punishment which it prescribes. They are those who commit the offense denounced while they are bankrupts or after they have received their discharges in bankruptcy. Under a familiar rule, this specification by the statute of those who are bankrupts, and those who have been bankrupts, as the persons liable to the punishment, necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offense it denounces. As the plaintiff in error was not and never had been a bankrupt, it is difficult to perceive how he could have been guilty of the offense of having concealed while a bankrupt, or after his discharge, from his trustee, any of his estate in bankruptcy. The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the Bankruptcy law, 30 Stat. 544, U. S. Comp. St. 1901, p. 3419, broadens the meaning of section 29b so that it includes the officers of a bankrupt corporation, who conceal the property of its estate in bankruptcy from its trustee, in the class subject to the punishment it prescribes. That clause reads in this way: '"Persons" shall include corporations, except where otherwise specified, and officers, partnerships and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers and members of the board of directors or trustees, or other similar controlling bodies of corporations.' A careful reading of this clause, however, in connection with the terms of section 29b, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29b are persons who are or who have been bankrupts. Hence none of those whom the word 'persons' is made to include under section 1, cl. 19—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless they are either bankrupts when they conceal the property, or have been such and have obtained their discharges before that time. Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute. Since the plaintiff in error was not a bankrupt when he was charged with concealing the property of the corporation, since he had never been a bankrupt and had not been discharged in bankruptcy, and since he had neither estate in bankruptcy nor trustee therein, he could not have concealed while a bankrupt, or after discharge, any of the property belonging to his estate in bankruptcy, from his trustee, and he was not

amenable to the punishment prescribed by subsection 29b. The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its trustee is clearly within the mischief of this subsection, and therefore within its true interpretation, is unworthy of serious consideration. A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act which is not clearly an offense by the express will of the legislative department of the government must not be made so after its commission by a broad construction adopted by the judiciary. The definition of the offense and the classification of the offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it, by construction, to a class of persons who are excluded from its effect by its terms, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces. United States v. Wiltberger, 5 Wheat. 96, 5 L. Ed. 37; United States v. Clayton, Fed. Cas. No. 14,814; *In re* McDonough (D. C.), 49 Fed. Rep. 360; United States v. Lake (D. C.), 12 Am. B. R. 270, 129 Fed. Rep. 499."

It would seem from this opinion that, if the members of a firm, seeing the probability of bankruptcy staring them in the face, should incorporate, they could then escape from punishment, if it were discovered that they had concealed any of the estate of the bankrupt corporation, because, according to the above decision, the act would be that of the corporation and not the act of an officer having its affairs in charge. At least the chances of punishment would be greatly reduced by the act of incorporation. There is absolute safety for the officer of a corporation guilty of concealing a part of his estate. If the second clause above mentioned does not mean that "persons" shall include officers, in a natural construction, it is impossible to understand the object of its enactment. It seems very plain to us that the legislative act intended to provide for the punishment of officers guilty of concealing the estate of the bankrupt corporation. Public policy demands it, for the corporation can only act by its officers and their only means of determining such misconduct is to hold such officers responsible who may be found guilty. There seems to us to be plenty of material in the act to have been the basis of an opinion which would have commanded what is right. As it is, the door is wide open for just such frauds as were committed in the principal case.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—PROHIBITION OF THE RAILROAD TICKET BROKERAGE BUSINESS.—The interesting question whether the legislature has the right to probibit the railroad ticket brokerage business is discussed in the recent case of *In re* O'Neill, 83 Pac. Rep. 104, where the Supreme Court of Washington upheld a statute of that state prohibiting all unauthorized business in the sale or purchase of railroad tickets. In the course of a very valuable opinion the court said: "Railway corporations exist by authority of the state, and are required to serve the public. One of the purpose of this act, as specified in its title, is, 'to prevent fraud upon travelers.' It is true there is no charge of actual fraud made against appellant; but the declared purpose of the statute is to prevent the possibility of fraud, and the method of regulation to prevent it has been violated by appellant. If it is within the power of the state to establish general rules designed to prevent fraud in the premises, appellant cannot be heard to say that the violation of those rules does not result in fraud. We are unable to see why the state which creates the corporation and requires that it shall serve the public has not the power to adopt reasonable regulative means applicable to that service, whereby no fraudulent imposition may be visited upon the public. If, within the opinion of the legislature as it is supposedly advised from experience of citizens of the state, the sale of railway tickets by others than the railway companies and their duly authorized agents results in fraudulent imposition upon travelers, then it would seem to be within the regulative police power of the state to adopt means to prevent it. The thing to be sold, viz., the right of transportation over the railway line, originally belongs to the company and is its property. The company is under obligation to sell that property to all who apply for it and who tender the necessary price. The state, by the act in question, has said that the original holder of that property and its duly authorized agents shall alone be permitted to sell it. Appellant's position is that he has the right to traffic in the property after the railway company has sold it, and that to deprive him of that privilege is to violate a constitutional right. The mere right to continue in the future to buy and sell property

of the class of railway transportation, which is primarily owned by the railroad company to be sold to the individual traveler for transportation, and not for the purpose of subsequent traffic therein for speculation and gain, we think cannot be such an individual property right as comes within the constitutional provisions, when considered as against the regulative power of the state concerning such transportation, and in the interest of protecting the property rights therein of the great number of people who become the owners of such property. Such traffic bears an important relation to the welfare of the general traveling public who are patrons of the railway companies, *quasi*-public orporations created to serve the public." That such legislation such as was upheld in the present case can be properly classified as a police regulation has been held in a number of states. Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Burdick v. People, 149 Ill. 600, 36 N. E. Rep. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; State v. Corbett, 57 Minn. 345, 59 N. W. Rep. 317, 24 L. R. A. 498; State v. Bernheim, 19 Mont. 512, 49 Pac. Rep. 441; Jannin v. State, 42 Tex. Cr. R. 631, 51 S. W. Rep. 1126, 62 S. W. Rep. 419, 96 Am. St. Rep. 821. While not expressly discussed, yet the police power in the premises was necessarily recognized in State v. Ray, 109 N. Car. 736, 14 S. E. Rep. 83, 14 L. R. A. 529, and Commonwealth v. Keary, 198 Pa. 500, 48 Atl. Rep. 472. It was also expressly stated in some of the decisions that such legislation does not deprive one of his property without due process of law. While that subject was not particularly discussed in the opinions of all the cases cited, yet such was the necessary effect of the decisions. In *Ex parte* Lorenzen, 128 Cal. 431, 61 Pac. Rep. 68, 50 L. R. A. 55, 76 Am. St. Rep. 47, the same was, in effect, held with relation to an ordinance of San Francisco, requiring that street car transfer tickets should be issued and delivered within the car from which the transfer is made, and received only within the car to which it is made, and forbidding any person, except the conductor or agent of the street car line, to give, sell, or issue any transfer check.

The defendants chief reliance in the principal case was upon the authority of the famous case of People v. Warden of Prison, 157 N. Y. 116, 51 N. E. Rep. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763. The majority opinion in that case was written by Chief Justice Parker, and held a statute of similar import to our own to be unconstitutional as taking property without due process of law and as interfering with the liberty of the citizen. There were three dissenting judges, and two somewhat extended dissenting opinions were written. Some of the opinions in cases we have cited above have referred to that case, and have followed the reasoning and conclusions of the dissenting judges, rather than the argument of Judge Parker. The court in the principal case, in concluding its argument on this point said: "Everyone has the natural and constitutional right to pursue a lawful business; but we do not think he has such right to traffic in the transportation of a railway company, without its permission or authority, as against the power of the state to regulate the sale of such transportation in the interest of the general public. A legislative act should be upheld, unless there are clear constitutional reasons for holding otherwise. We are not convinced that such reasons exist in this case, and we are disposed to adopt the views of what we are constrained to believe is the weight of authority having reference to decisions upon statutes treating of the same subject-matter in sister states. The arguments of the other courts may not be as elaborate as that of Judge Parker. His distinguished personality as a jurist and otherwise should cause his opinion and argument to receive much consideration, but his conclusions are not supported by the decisions of the other courts."

THE DOCTRINE OF PREVIOUS JEOPARDY.

The doctrine of previous jeopardy is sacred with the English speaking people. It is imbedded in the bed rock of our law. It stands as a safeguard against oppression and wrong. It is the beacon-light of modern civilization and clarifies the gloom of the dark ages. Without this principle despotism thrives; within its effulgent light it shrivels as overtender plants in the noon-day's sun. Without it, criminals might be made to pay the penalty of their crimes as often as it might please the whim or caprice of his government to try him. Without it, there could be no security from injustice and wrong. Without it, our liberties would not, and could not, be guaranteed to us. But with it, when one has once paid the penalty for wrong-doing, and this is as near as it is possible to right the wrong when once done, he is a free man in every sense of the word and is capable of feeling and acting it. Then it is that he can look the world in the face and say, "you cannot touch me; I have expiated my crime; I am now a free man, entitled to all the rights under the government that is accorded to every other citizen." Being once in jeopardy, one cannot again be tried for the same offense, whether the prosecution was successful or unsuccessful in establishing his guilt. This is guaranteed to the citizens of the United States by our national and state constitutions. But what is jeopardy? Jeopardy

is the peril in which the defendant is put when he is regularly charged with crime before a tribunal properly organized and competent to try him. He must under such circumstances submit the sufficiency of his defense to the decision of a jury of his peers. He is in their hands exposed to the danger of conviction with all its consequences; or, in the language of the bill of rights, he is "in jeopardy." From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury. Unless some overruling necessity arises, after the jeopardy begins, the trial must proceed until it ends in a conviction or an acquittal.[1] In a capital case, therefore, the court has no power to discharge a jury without the consent of the defendant, unless an absolute necessity requires it.[2] The mere inability of the jury to agree within a few hours or days is not such a necessity;[3] nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended. The serious illness or insanity of the defendant, and the illness, insanity or death of the judge or a juror engaged in the trial, have been held to create a necessity for the withdrawal of a juror and a postponement of the trial; and other instances of the same nature might arise which would justify a like action. In Commonwealth of Pennsylvania v. Fitzpatrick, the jury had been dismissed in disregard of the protests of the defendants, and when they were again put on trial, they had a right under the constitution to say: "We have been once put in jeopardy for this crime, and we cannot be compelled to undergo the same peril a second time for the same offense." This was the effect of their special plea and it was unanswerable.[4] In State v. McKee,[5] it was held that, after a jury has been charged with the trial of a prisoner upon an indictment for a capital offense, it cannot be discharged, and the prisoner remanded for a second trial, except for the following causes: (1) the consent of the prisoner; (2) the illness of one of the jury, the prisoner, or the court; (3) the absence of one of the jurors; and (4) the impossibility of their agreeing upon a verdict. The plea of former jeopardy will protect a defendant from a second trial only upon such charges as he might have been convicted upon under the first indictment.[6] It is not sufficient to show that the jeopardy had once attached, but it must be shown that it had not been discharged by operation of law or waived.[7] Hence where the court of its own motion without the consent of the prisoner being asked or given, discharged the jury impaneled and sworn in a capital case, before any evidence had been given, a plea of former jeopardy is good, and the accused cannot be brought to trial again for the same offense.[8] If a party is once put upon trial before a competent court and jury upon a valid indictment, the jeopardy attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by legal necessity, or by his consent; or in case a verdict is rendered, if it be set aside at his instance.[9] Where accused has entered a plea of guilty, and nothing remains but to pass judgment, he has been in jeopardy;[10] and where a jury is impaneled and sworn, in a court of competent jurisdiction, to try a prisoner under an indictment, sufficient in form and substance to sustain a conviction, he is in jeopardy.[11] Legal jeopardy does not arise if the court has no jurisdiction of the offense.[12] Nor if it appears that the first indictment was clearly insufficient and invalid.[13] Nor is such a party put in legal jeopardy, if the term of court, as fixed by law, comes to an end before the trial is finished.[14] Where the trial has commenced, and the evidence was clearly in, when a juror was taken sick and the panel discharged, it was held that the prisoner had not been in jeopardy.[15] Where on the

[1] Commonwealth v. Fitzpatrick, 1 L. R. A. 451.

[2] Commonwealth v. Cook, 6 Serg. & R. 577.

[3] Commonwealth v. Clue, 3 Rawle, 498.

[4] Pieffer v. Commonwealth, 15 Pa. 468; McFadden v. Commonwealth, 23 Pa. 12; Wright v. State, 5 Ind. 290; Daggett v. Bonuvitz, 107 Ind. 276; Doles v. State, 97 Ind. 555; Maden v. Emmons, 83 Ind. 331.

[5] 21 Am. Dec. 499.

[6] Hilands v. Commonwealth, 114 Pa. 372.

[7] Hensley v. State, 107 Ind. 587.

[8] Hilands v. Commonwealth, 111 Pa. 1.

[9] People v. Horn, 70 Cal. 17; People v. Webb, 38 Cal. 467.

[10] Boswell v. State, 111 Ind. 47.

[11] State v. Ward, 48 Ark. 36.

[12] Commonwealth v. Goddard, 13 Mass. 455; People v. Tyler, 7 Mich. 161; Montross v. State, 61 Miss. 429.

[13] Commonwealth v. Bakeman, 105 Mass. 53; Gerard v. People, 4 Ill. 362; People v. Cook, 10 Mich. 164.

[14] State v. Brooks, 3 Hump. 70; Mahala v. State, 10 Yerg. 532; Wright v. State, 5 Ind. 290.

[15] State v. Emory, 59 Vt. 84.

trial of a criminal case, the state introduced evidence and rested, and the defendant introduced his evidence, and the district attorney then moved for leave to introduce a witness who had not been before the grand jury, and of whose examination notice had not been given, and the motion was sustained; and the defendant then elected to have the case continued, which was done accordingly, he could not object to another trial, on the ground that, by the proceedings above referred to, he had already been put in jeopardy.[16] The discharge of a jury from giving a verdict in a capital case, withouth the consent of the prisoner, the jnry being unable to agree, is not a bar to a subsequent trial for the same offense;[17] nor if the jury is discharged after considering the cause for such a length of time as to leave no reasonable expectation that they will be able to agree upon a verdict;[18] nor if, by any overruling necessity, the jury are discharged without a verdict;[19] nor if the verdict is set aside on motion of the accused, or on writ of error, based on his behalf;[20] nor in case the judgment is arrested on his motion.[21] If a juror fraudulently procures himself to be put on the jury to acquit the prisoner of murder, the judge may direct the withdrawal of a juror, even if the prisoner was innocent of the fraud; and this constitutes no jeopardy.[22] And there was no jeopardy where, in a murder case, the jury having been out ten days, the judge withdrew a juror, and ordered a mistrial.[23] Under the statute, conviction or acquittal by a judgment or verdict will bar another prosecution for the same offense, notwithstanding a defect in form or substance of the indictment; but by any proceeding short of conviction or acquittal, the defendant is not in jeopardy if the indictment is so defective that a conviction under it would be reversed for error.[24] A trial of the defendant upon a transcript without a seal would be no jeopardy, and no defense against a trial upon the same record after it is perfected by the seal.[25] The record disclosing that the jury on the former trial were not discharged until they had been considering a verdict for two days, and that they were discharged because they had been kept together until it became altogether improbable that they could agree, the defendant's plea of former jeopardy was properly overruled and stricken out.[26] If a juror so acts that no verdict can be rendered, this does not, like a wrongful discharge of the jury by the judge, entitle the defendant to go free, or protect him from a second jeopardy.[27] A prisoner will not be deemed to have consented to the withdrawal of a case from the jury, merely because he kept silent. As was said by McIver, C. J., in State v. Richardson:[28] "It is true that it is stated in the 'case' that when the solicitor moved to withdraw the case from the jury, no objection was made by the prisoner; but it also appears in the 'case' that the prisoner was not at that time represented by counsel, and it would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury, simply because he interposed no objection, which, possibly, he did not know he had a right to do. Besides, consent is active, while not objecting is merely passive. The old adage 'silence gives consent' is not true in law; for there it only applies where there is some duty or obligation to speak."[29] A change in a constitutional provision as to former jeopardy, more favorable to the prisoner applies to a trial subsequently begun, although the offense was committed prior to the change, where the constitution expressly provides that all laws inconsistent with the new constitution shall cease upon its adoption.[30] In the case of Weaver v. State,[31] it was held that until a defendant entered his plea of not guilty, or, upon his refusal to plead, it had been entered for him, he could not be regarded as in jeopardy. The court said, quoting from Bishop's Criminal Law: "Not only must the tribunal be made complete by the impaneling of the jury, as already explained, in order to produce the legal jeopardy of

[16] State v. Falconer, 79 Iowa, 416.
[17] United States v. Perez, 22 U. S. 9.
[18] Dobbins v. State, 14 Ohio St. 493.
[19] United States v. Perez, 22 U. S. 9; People v. Goodwin, 18 Johns. 187.
[20] State v. Redman, 17 Iowa, 329.
[21] People v. Casborus, 13 Johns. 351; Coleman v. Tennessee, 97 U. S. 509, 521.
[22] State v. Washington, 89 N. Car. 525.
[23] State v. Washington, 90 N. Car. 664; State v. Carland, 90 N. Car. 668.
[24] State v. Ward, 48 Ark. 36.
[25] Ball v. State, 48 Ark. 94.
[26] Smith v. State, 22 Tex. App. 196.
[27] Henning v. State, 106 Ind. 386.
[28] 47 S. Car. 166.
[29] State v. Edwards, 13 S. Car. 30; State v. Serin, 32 S. Car. 401.
[30] State v. Richardson, 47 S. Car. 166.
[31] 83 Ind. 289.

which we are treating, but all other preliminary things of record necessary to sustain the verdict of guilty, if rendered, must be done." It is true that defendants, even in cases of felony, may waive formal arraignment, and it is perhaps true that an accused person, submitting to a trial without an arraignment will be deemed to have waived it; but the calling upon the defendant to plead, and his plea made by himself or entered for him, would seem to be a necessity. "The right of arraignment on a criminal trial, may in some cases be waived, but a plea is always essential. The court cannot supply an issue after verdict, where there has been no plea, notwithstanding that the defendant consented to go to trial. [32] In Newson v. State, [33] it was ruled that "a case is submitted when the prisoner has been arraigned—the plea of not guilty filed—and the jury impaneled and sworn." In Douglass v. State, [34] it was ruled that "an arraignment may, in minor offenses, be waived by the defendant, but a plea is necessary to form an issue. An issue in a criminal case cannot be supplied so as to correspond with the verdict, where there has been no issue joined; and a verdict in a criminal case, where there has been neither arraignment nor plea, is a nullity and no judgment can be rendered thereon." This statement of the law was reaffirmed in Davis v. State. [35] A municipal court is not deprived of jurisdiction to try an offense against a municipal ordinance, by the fact that a prosecution is pending in a state court against the same offender, for the same act as an offense against the general criminal law of the state. [36] Some courts have held however that a city court has no right to punish an offense against a city ordinance, which at the same time is punishable by the state courts. This view however does not seem to be well taken. On the dismissal of an indictment on the motion of the county attorney, a second indictment may be found by the same grand jury for the same offense, on the evidence already received, on which the former indictment was found, and it is not necessary that any new or additional evidence be received. The *nolle prosequi* of the prosecutor is not the same as the throwing out of the indictment by the judge. [37]

Withdrawing a criminal prosecution from a jury which has been charged with the trial of a prisoner, and dismissing the jury merely because a witness was absent, are an acquittal and the prisoner cannot again be placed on trial, under a constitutional provision that no person shall for the same offense be subject to be twice put in jeopardy of his life or liberty. [38] A suit for an injunction against the violation of a statute, and punishment for contempt of such injunction, in addition to a criminal prosecution for the illegal act, do not violate the constitutional provision against putting a person twice in jeopardy for the same offense. [39] A person is not twice put in jeopardy because he is subjected to an action for a penalty, as well as to a criminal prosecution for the same offense. [40] An acquittal on a charge of a criminal offense is a bar to a prosecution of the accused for perjury in swearing that he did not commit the offense. [41] In the case of the United States v. McKee, [42] the defendant had been convicted and punished under a section of the revised statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without the payment of the taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The court held that the two alleged transactions were but one, and that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty. Judge Van Fleet, in his Treatise on the Law of Former Adjudications, p. 1242, Sec. 628, says: "If there is a contest between the state and the defendant in a criminal case over an issue, I know of

[32] Wharton Criminal Pl., 8th Ed., Sec. 409.

[33] 2 Ga. 60.

[34] 3 Wis. 820.

[35] 38 Wis. 487.

[36] City Council of Anderson v. John O'Donnell, 1 L. R. A. 632.

[37] State of Minn. v. Peterson, 28 L. R. A. 824. 1 Bishop Crim. Proc., § 870.

[38] State of South Carolina v. Richardson, 47 S. Car. 166.

[39] State v. Roby, 142 Ind. 168; Beedle v. Schoonover, 135 Ind. 526; Scoby v. Stevens, 103 Ind. 55.

[40] State v. Schoonover, 21 L. R. A. 767; State v. Stevens, 103 Ind. 55.

[41] Cooper v. Commonwealth of Kentucky, 45 L. R. A. 216.

4 Dell. 128.

no reason why it is not *res adjudicata* in another criminal case."

An acquittal on the charge of criminal libel in the use of certain words contained in a published article, bars a subsequent prosecution for libel in the use of other words contained in the same article, published at the same time and in the same newspaper.[43]

When one has committed a criminal act, the prosecutor may carve out of it as large an offense as he may be able, but he cannot split and divide it up into parts without violating the rule of law "that a man shall not be twice vexed for one and the same cause." As to habitual criminals it may be said that the constitutional provision against putting a person twice in jeopardy for the same offense is not violated by imposing greater penalties upon persons convicted of a crime, if they had been previously convicted.[44] It was said in Ingalls v. State,[45] "the increased severity of punishment for a second or subsequent offense is not a punishment of the person for the first offense a second time, but a severer punishment for the second offense, because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than should be inflicted upon the person guilty of the first crime." So much for the subject of these remarks, which is one of the many safeguards against oppression and wrong, thrown around the accused by our national and state constitutions.

G. W. PAYNE.

Indianapolis, Ind.

[43] State of California v. Stevens, 4 L. R. A. 845.

[44] Moore v. Missouri, 159 U. S. 673; Kelley v. People, 115 Ill. 583; Ingalls v. State, 48 Wis. 647.

[45] *Supra.*

FEDERAL REGULATION OF INTERSTATE COMMERCE—PREFERENCES AND DISCRIMINATION.

INTERSTATE COMMERCE COMMISSION v. CHESAPEAKE & OHIO RAILWAY CO.

Supreme Court of the United States, February 19, 1906.

An interstate carrier not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.

Mr. Justice WHITE delivered the opinion of the court:

Following an inquiry, begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. at L. 847, ch. 708, U. S. Comp. Stat. Supp. 1905, p. 590), in the Circuit Court of the United States for the western district of Virginia, this proceeding against the Chesapeake & Ohio Railway Company, a Virginia corporation, and the New York, New Haven, & Hartford Railroad Company, a corporation, of the state of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake & Ohio, and the New Haven. The petition averred that the Chesapeake & Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake & Ohio bought it and the cost of transportation from Newport News to Connecticut, would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying coal from the Kanawha district to Newport News whilst the published tariff for like carriage from the same district was $1.45 per ton. Referring to the developments before the Commission, and annexing as part the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake & Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination, for two reasons: First. Because if such difference existed, it was a loss suffered by the Chesapeake & Ohio, not from taking less than its published rates, but because it had received less as seller than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake & Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made, the New

Haven had a claim exceeding $100,000 against the Chesapeake & Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake & Ohio, including its published rates. Averring that the prior contract was in itself void because it also embodied an agreement to take less than the published rates, and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake & Ohio, knowing that they were in violation of the interstate commerce law. The prayer was that the Chesapeake & Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal, and the other from seeking to enforce it; that the Chesapeake & Ohio be enjoined from "accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported * * * at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practiced." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it." A preliminary restraining order was issued, conforming to the prayer of the petition. The Chesapeake & Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about 60,000 tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the coal, plus the published rates and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about $100,000, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake & Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that, at about the time the original contract was made, arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of $100,000 to the Chesapeake & Ohio was occasioned. The New Haven road, in its answer, asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake & Ohio, and not a shipper over that road; that the coal bought was intended for its own use in the operation of its railroad; that it had no knowledge of the price which the Chesapeake & Ohio would be obliged to pay for the coal, or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not equal the market price of the coal, the cost of delivery, and the published rate of the Chesapeake & Ohio. It averred the validity of the agreement, the legality of the debt of $100,000 which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake & Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake & Ohio. It denied that there was any departure from the published rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled the Chesapeake & Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if, in execution of the contract, a condition arose where a loss was suffered by the Chesapeake & Ohio in either capacity, it was caused by subsequent events which could not affect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake & Ohio of less than its published rates. The case was heard on the testimony taken in the proceeding before the commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel. For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the 2d and 6th sections of the act to regulate commerce, forbidding the taking of less than the published rates. (24 Stat. at L. 379, ch. 104, U. S. Comp. Stat. 1901, p. 3154.) It, however, held that the contracts amounted to an undue discrimination and a violation of the 3d section of the act. The court, hence, permanently enjoined the Chesapeake & Ohio from discharging any obligation arising from the original con-

tract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the commission, that the injunction be expanded so as, in general terms, to command the Chesapeake & Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake & Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits, and in effect asks its reversal on the merits. It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy, as considered by the commission on the inquiry by it conducted, and as decided below, and as here presented, involves an analysis of all the dealings under both contracts, and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are undisputably established, reserving such questions of fact as are in dispute for separate consideration when we approach the legal propositions which arise from the undisputed facts. The Chesapeake & Ohio, chartered by the state of Virginia, operates a road which reaches both the New River and Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the state of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy, between July 1, 1897, and July 1, 1902, not to exceed 2,000,000 gross tons of bituminous coal, to be taken from the line of the Chesapeake & Ohio road; deliveries to be made not exceeding 400,000 tons per annum. The price agreed upon was $2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The Chesapeake & Ohio, not in its own name, but through others who really, although not ostensibly, acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfill the contract which had been made with the New Haven. In consequence of failure of some of the operators to perform their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900–1901, when, because of strikes and other difficulties, delivery ceased, and the New Haven bought coal in the open market and presented to the Chesapeake & Ohio a bill for the increased price which it had paid, and the Chesapeake & Ohio paid $160,000 to cover such loss. Subsequently, in 1902, further strikes supervened and deliveries again ceased, at a time when about 60,000 tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to $103,000. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of 60,000 tons upon the original contract might be discharged by delivery on the part of the Chesapeake & Ohio of that amount of coal from the Kanawha district at the contract price of $2.75, and when this delivery was consummated it was agreed that the Chesapeake & Ohio would be absolutely relieved from the payment of the damage claim just referred to. At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake & Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement, an individual who represented the Chesapeake & Ohio made contracts in his own name with the operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake & Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery. Undoubtedly long prior to the making of the first contract the Chesapeake & Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows: "The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company." And the same official testified that he made the contract of 1896 as a continuation of this system. In 1895, however, the state of West Virginia passed, "an act to prevent railroad companies from buying or selling coal or coke and to prevent discrimination." The first section of this act made it unlawful for any railroad cor

poration to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake & Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven, to do so not in its own name, but through another. Before applying to these undisputed facts the legal question arising for decision, we must determine a question of fact as to which there is some dispute; that is, was the price at which the Chesapeake & Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence, we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract, and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff. We are brought, then, to determine whether the contract made in 1896 for the 2,000,000 tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we, for the moment, put out of view the provisions of the West Virginia statute, and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake & Ohio had obligated itself to deliver. We shall also assume, for the purpose of the inquiry, that the Chesapeake & Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions. The question therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates? The previous decisions of this court concerning the interstate commerce act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions, against discrimination, favoritism, or rebates, but have mainly concerned the meaning of the act in other respects; that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission. There are several leading cases decided by the commission, which are relied upon by the two railroads, directly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them. It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable

a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monoply in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately, and not merely remotely, to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law, and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport commodity, is illustrated by the case of Atty. Gen. v. Great Northern R. Co., 29 L. J. Ch. (N. S.) 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798): "These large companies, joint-stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money—large amounts of property—and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways." Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p. 799): "Here we find this company, having the traffic from the north of England, where the great coal fields are (at least, some of the principal coal fields) supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic; that is, the dealing in all the coal in the large districts supplying coal to the country. They have, to a considerable extent, done so, and there is no reason why it should not go on progressing. I observe that in the eight (?) years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal." It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to dis-

regard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier, and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent. And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage," and "unjust discrimination," are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and, as such dealer, to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions. (*a*) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute. (*b*) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proofs shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control. The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake & Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake & Ohio was wholly indifferent to and did not concern itself with, the prohibitions of the statute, of which, of course, it must be assumed to have had full knowledge. As we have seen, the president of the Chesapeake & Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line, and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake & Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that, in making the contract, the Chesapeake & Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the interstate commerce act. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in their stead of the conceptions of the Chesapeake & Ohio as to what was best for itself and for the public. Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not suffi-

cient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating, for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depends not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute. (c) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted. But it is in effect said, conceding this to be true as an original question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an administrative construction long since given to the act by the interstate commerce commission, the body primarily charged with its enforcement, and which has become a rule of property, affecting vast interests, which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by congress by frequently amending the act without changing it in this particular. Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the interstate commerce commission upon which the premise is based are Haddock v. Delaware, L. & W. R. Co., 4 I. C. C. Rep. 296, 3 Inters. Com. Rep. 302, and Coxe Bros. v. Lehigh Valley R. Co., 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460, decided respectively in 1890 and 1891. Without going into detail, we content ourselves with saying that in both of the cases complaints were made to the interstate commerce commission concerning the defendant railroads, and it was charged that whilst acting as common carriers they were dealing in coal, and as a result violating the prohibitions of the interstate commerce act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers, prior to the adoption of the interstate commerce act, were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined, and transporting the same to market. Indeed, it was found in both cases that the functions of producing and transporting, as authorized, were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold, and transported some coal which was not produced in the mines which they owned, this fact was evidently treated, in view of the other circumstances of the case, as of minor importance, since the commingled powers of producing, selling, and transporting were alone made the basis of the conclusion reached by the commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell, and transport, existing before the passage of the act to regulate commerce, the commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the interstate commerce act was pointed out by the commission in *Re* Alleged Unlawful Rates, 7 I. C. C. Rep. 33. In that case, in deciding that the defendant carrier was without power to purchase grain for the purpose of securing the right to transport it, and thus evade the law which would have applied to its transportation had it been owned by any other party, the commission, in distinguishing the case before it from the Haddock and Coxe Bros. cases, said (p. 38): "Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property; and to order it to charge itself with a particular rate

would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one." Now, without at all intimating that, as an original question, we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the Haddock and Coxe Bros. cases would have been confiscatory, and without reviewing the rulings made by the interstate commerce commission in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least, until congress has legislated on the subject. We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the commission concerning such matters was entitled to great weight, and was not lightly to be interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows since the Chesapeake & Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the Haddock and Coxe Bros. cases. Concluding, therefore, that both the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake & Ohio, and therefore the court below was correct in so deciding. This leaves only for consideration the question raised by the cross appeal of the interstate commerce commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the commission: "That the Circuit Court of the United States for the western district of Virginia, after finding that the claim of the New York, New Haven & Hartford Railroad Company against the Chesapeake & Ohio Railway Company, for $103,910.69, asserted as damages arising from a partial nonperformance by said railway company of a contract of December 3, 1896, set out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforcible claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake & Ohio Railway Company, its officers, agents, and employees from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake & Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake & Ohio Railway Company from transporting coal from one state to or through any other state for the New York, New Haven & Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven, & Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage; and said decree entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven, & Hartford Railroad Company and its officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake & Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage." The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate com-

merce in any particular, it is the duty of the court not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *Re* Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the 2d and 6th sections of the act, relating to the maintenance of rates, had been violated, the injunction by it issued was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal. And, as thus modified, the decree below is affirmed.

NOTE.—*Discriminations by Carrier in its Own Favor as Violating the Interstate Commerce Law.*—One of the earliest adjudications of the commission involving a discrimination by a carrier in its own favor is that of Haddock v. D.,L. & W. R. R., 4 I. C . C. R. 296, decided in 1890. The petitioner and defendant, in its capacity as a shipper of coal, were competitors. The petitioner alleged that the railroad company in disposing of the product of its own mines, or in selling coal which it brought from other collieries, at the point of destination to which both parties customarily shipped, did so at a price which did not cover the cost of mining the coal at its own collieries or the price which it paid other operators, adding thereto a reasonable charge for selling expenses and he rate of transportation which it charged to other shippers, among which was the petitioner. The evidence fully sustained the allegation. It appeared that the railroad had kept no books which would show whether the loss fell upon it as producer, shipper or carrier. The commission held that it had no power to order the keeping of such books and that if such books were kept, they would be of little service. The practical effect of this ruling was to allow carriers, by a method similar to the one followed in this case, to discriminate in their own favor. The commission went no further than to hold that when the carrier sells its own coal at the point of destination at a price not sufficient to yield the aggregate cost of production *plus* the published rate, such a state of facts is merely evidence tending to show that the published rate, which was charged to others, was unreasonable. The supreme court in the Coal Rates Case goes much further and makes a broader and different decision. In the following year (1891) the commission reaffirmed the position which it had taken in the Haddock Case in Cox Bros. & Co. v. Lehigh Valley R. R. Co., 4 I. C. C. R. 535. This complaint was brought by independent bituminous coal operators in Pennsylvania. They alleged *inter alia* that the defendant railroad was discriminating in its own favor as a producer of anthracite. The proof established that a subsidiary corporation, known as the Lehigh Valley Coal Co., the stock of which was owned exclusively by the defendant railroad, was engaged in mining anthracite coal; that this coal was invariably shipped by the Lehigh Valley Railroad; that when it reached tidewater it was sold at such prices, that after deducting the public tariff charges of the railroad, there remained to the coal company, as representing the value of the coal at the mines, much less than the coal actually cost to mine. It was contended that by this operation of the railroad company as miner, shipper and seller, as well as through its transactions as dealer, it was in effect giving to itself, through the coal company, an undue preference. The commission, however, held that inasmuch as the coal company had the right to mine and sell coal and that the railroad had the right to hold the stock of the subsidiary corporation, it could not interfere and, following the Haddock case, *supra*, that the facts as proven were only evidence tending to show that an unreasonable rate was charged complainants.

Another of the commissioners' adjudications is of interest as showing a weakening of the Haddock and Cox decisions, due no doubt to a realization on the part of the commisson that the Interstate Commerce Law was in reality being evaded by devices which their former rulings had made possible or at least plausible. This is known as the Grain Rates case (In the matter of the grain rates of the C. & G. W. Ry., 7 I. C. C. R. 33.) In this case it was shown that the offending railroad owned the entire stock of a subsidiary corporation, known as the Iowa Development Co. The railroad caused grain to be purchased in Kansas City in the name of this controlled company, transported over its own line to Chicago, at which place it was sold. The development company had no *bona fide* interest in the matter. The whole transaction was shown to be a mere device to secure transportation at other than the published rate and the only rate paid was the profit on the transaction, which varied with each shipment. It was held that this consititued a violation of sections 2, 3 and 6 of the Act. This case was distinguished from the Haddock and Cox cases, *supra*, not so much in the fact, as Justice White states "that the rulings in the two cases just referred to were solely placed

upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the Interstate Commerce Act." The true ground of distinction as made in the grain rate case "was in the case under consideration, the grain was property which the carrier had bought for the express purpose of securing the right to transport it and thus evade the law which would have applied to its transportation had it been owned by any other party."

In other words, the answer to the question propounded by Judge White in the coal rate case: "Has a carrier engaged in interstate commerce the power to contract and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?" depends in the commissioner's view not so much upon whether the carrier had the power, at the time of the passage of the act, of possessing the mingled attributes of producer and carrier, but rather upon the motive or purpose with which it carried. These two tests are widely different. The one applied by the supreme court was, as a matter of fact originated by that body, as an examination of the decisions upon which it is stated to be based will reveal. Notwithstanding this, there can be little doubt but that the rule, as announced by Justice White is the better. Under the commissioner's rule, whether a certain contract or act is a violation of the statute, depends upon the motive or purpose with which it was entered into or done and not upon the character of the contract or act itself. Such a distinction seems impracticable and illogical. It is impracticable because of the impossibility in most cases of showing the motive with which an act was done. It is illogical as, under it, the statute is violated only when it can be affirmatively proven that a violation was intended. The commissioner's rule would make the state of mind of the defendant the criterion of guilt or innocence.

The real effect which the decision, to which this note is appended, will have upon former opinions of the interstate commerce commission is no better exemplified than by applying its reasoning to the most recent decision (McGrew v. Mo. Pac. Ry. Co., 8 I. C. C. R. 630, decided 1901), of the commission, upon the same point. In this case complainants, who owned coal mines in Myrick, Mo., alleged that the Missouri Pacific Railway was virtually discriminating in its own favor by charging a relatively smaller rate from its own mines in Rich Hill, Mo., to Kansas City. It was shown that the defendant both mined and transported its coal to market. The commission states: "It is a matter of entire indifference to it (*i. e.* the defendant), whether a profit accrues from the mining or from the transportation. It may so adjust its rates that the mining of the coal will be conducted at a loss, the profit being derived from the carriage, and in such event every coal operator upon its line, paying those rates, must do business at a loss. The only remedy in such a case to the independent operator is to secure to him a reasonable rate." Nothing was stated or shown on the part of defendant in this case to the effect that the Missouri Pacific Railway Co. was possessed either by charter or by legislative grant, existing at the time of the adoption of the act to regulate commerce, of the "commingled attributes of carrier and producer," and it cannot be doubted but that should the commission now be called upon to decide a case similar to this, it would, since it is of course bound by the views of the supreme court, be compelled to reverse its decision. On the general proposition that a carrier may not discriminate in own favor, see Baxendale v. Great Western Railway Co., 1 Nev. & McN. 202; Garton v. Bristol & Exeter Railway Co., 1 Nev. & McN. 218; Reynolds v. Railroad, 1 Interstate Com. Rep. 685; Riddle, Dean & Co. v. Railroad, 1 Interstate Com. Rep. 688; Riddle, Dean & Co. v. Railroad, 1 Interstate Com. Rep. 787; Heck & Petree v. Railroad, 1 Interstate Com. Rep. 775.

ROBERT BURKHAM.

JETSAM AND FLOTSAM.

DEBENTURES—RE-ISSUING.

Where there is an issue of debentures creating a charge and ranking *pari passu*, and no special power is given to re-issue debentures which have been paid off, and on paying off a debenture the company takes a transfer of it to itself, there is a merger; the debenture is dead and cannot be re-issued. That was decided by Buckley, J., in *Re* George Routledge & Sons (1904), 2 Ch. 474. But suppose that, instead of taking a transfer to itself, the company receives back the debenture with a transfer indorsed on it, signed by the debenture-holder, but leaving a blank for the name of the transferee, and subsequently the company takes the face amount from A B, fills up the blank with his name, and hands him the debenture—has A B any security as against the other debenture-holders? The court of appeals says that he has not. In arriving at this conclusion the court has applied to well-known commercial document, principles which have been laid down with regard to mortgages of real estate, and so long ago as 1856, it was settled that a mortgagor who pays off an incumbrance created by himself on real estate cannot set it up against a subsequent incumbrancer. Other rulings, by one of the lord justices, were (1) that the re-issue was in substance the creation of a fresh charge which required a new stamp; (2) that payment off of the loans in respect of which the debentures were issued had the same effect as payment off of the amounts due on the debentures themselves; (3) that even contemporaneous transfer to a trustee for the company is not conclusive evidence against the presumption that the charge was to be extinguished; (4) that without express power a company which has issued debentures to the full authorized amount cannot re-issue a debenture. But the case does not seem quite clear on one or two points. If payment off kills the debenture, can it be kept alive or restored to life by taking the transfer in the name of a trustee for the company, even if there is a clear and unequivocal expression of an intention to keep the debenture alive? Is the transferee a secured creditor as against the company, of course, ranking after the debentures of the series which have not been paid off? Does an express power (inserted in all the debentures) to re-issue debentures enable the company to re-issue so as to bring the debentures re-issued in line with the unredeemed debentures? The last question may safely be answered in the affirmative. The second question would probably be answered in the same way. But it can scarcely be considered quite safe to take a debenture which, on payment off by the company, was transferred to a trustee for the company, even where there is such a contemporaneous expression as is mentioned above. —RE W. TASKER & SONS (LIMITED) (C. A., Aug. 5, 1905) (1905, 2 Ch. 587).—*Solicitor's Journal.*

CORRESPONDENCE.

RESTRICTION OF PERSONAL LIBERTY UNDER COVER OF THE POLICE POWER.

Editor of the Central Law Journal:

Much interest is expressed among Spokane lawyers concerning the decision of the supreme court of this state, which was written by Justice Rudkin, in which he indulges in fine sarcasm at the expense of the legislature, which at its last session passed a law regulating plumbing in cities of the state having a population of 10,000 or over. The court has unanimously declared the law unconstitutional. The opinion says:

"We cannot close our eyes to the fact that legislation on this line is on the increase. Like begets like, and every legislative session brings forth a new act of interest to some trade or occupation. The doctor, the lawyer, the druggist, the dentist, the barber, the horseshoer and the plumber have been cared for, and the end is not yet, for the nurse and the undertaker are knocking at the door. It will not do to say that any occupation which remotely affects the public health is subject to legislation of this kind. Our surroundings bring up many reflections. Our health may be affected by our clothes, our traveling, our food, etc., but for this reason must we license the architect, the tailor, the carpenter, the shoemaker? If so, soon all honest toil must purchase a license from some board or commission. Health is important, but liberty does not occupy a secondary place in our fundamental law. Some boards have a member of the board of health as part of the examining board, but this law lacks even this saving grace. Why should a court blindly declare the public health involved when we know that control of plumbing business by a board is the sole end in view. The act has no relation to the public health as a sanitary or police measure, and the judgment is reversed and the prisoner ordered discharged.

STORRY BUCK.

Spokane, Wash.

BOOK REVIEWS.

ENCYCLOPEDIA OF EVIDENCE, VOL. 7.

Words of general encomium are not so many that they may not become completely exhausted in reviewing six successive appearances of any work which the reviewer finds very attractive. Such, indeed, is the predicament in which the present writer finds himself as he takes up for review the seventh volume of that great work now running through the press, known as the Encyclopedia of Evidence. The present volume under review maintains the high reputation of the preceding volumes for thoroughness, clearness and exhaustiveness. No work on evidence ever pretended to go into such minute details as does this great encyclopedia, and no one knows better than the trial lawyer the great importance of such details on questions of evidence. General rules or well settled principles are not sufficient to settle the innumerable variations in the application of such rules and principles to the unexpected and kaleidoscopic changes in the facts of each particular case, which, without warning, perplex both counsel and court, who cannot be expected on the spur of the moment to reason out carefully and logically the application of some general rule to the new and unusual situation which confronts them both. It is at such moments that a work like this which we have for review displays unquestioned superiority over the more theoretical text-books on the subject of evidence. For instance, on the subject of Impeachment of Witnesses, by Charles M. Wofford, which appears in the present volume of the Encyclopedia of Evidence, we have 253 pages of text and note, more than can be found in any other text-book on the subject of evidence. A glance at this article at once reveals its great value. In addition to the statement of the general rules we have in the text the application of these general rules to every conceivable arrangement of facts, and in the notes, not merely the citation of the case, but after each citation a still further elucidation of the facts which distinguish each of the cases cited. In this way an attorney, in the midst of trial and on the spur of the moment can find at once a case exactly in point if there is such a case in the whole course of judicial decisions. The same thing can be said of the other subjects of law treated in this volume, among which are, Incest, 6 pages; Infants, 24 pages; Injunction, 60 pages; Injuries to Persons, 70 pages; Insanity, 37 pages; Insurance, 84 pages; Intent, 63 pages; Intoxicating Liquors, 112 pages; Judgments, 88 pages, and Judicial Notice, 167 pages. We were particularly pleased with the discussion of this latter subject by Edward W. Tuttle. It is the most logical, full, complete and satisfactory discussion of this important and interesting subject which we have ever read. It is a text-book in itself of great value and originality. On the whole this new volume increases the already splendid reputation of the publishers in preparing and publishing this new and valuable encyclopedia.

One volume of 1036 pages, and published by L. D. Powell Co., Los Angeles, Cal.

BOOKS RECEIVED.

International Law, with Illustrative Cases. By Edwin Maxey, M. Dip., D. C. L., LL. D. Professor of Constitutional and International Law, Law Department, West Virginia University. St. Louis. The F. H. Thomas Book Co., 1906. Sheep, price $6.00. Review will follow.

A Treatise on the Incorporation and Organization of Corporations created under the "Business Corporation Acts" of the several states and territories of the United States. Including therein a synopsis-digest of the general incorporation acts of the several commonwealths, with decisions bearing thereon; also, forms for drawing charters under the laws of the several states and territories; general and specific object clauses for insertion in charters; by-laws, minutes, etc., etc. By Thomas Gold Frost, LL. D., Ph. D., of the New York Bar. Author of "Treatise on Guaranty Insurance," "The French Constitution of 1793," etc. Second Edition, enlarged and revised to January 1, 1906. Boston. Little, Brown & Co., 1906. Buckram. Price, $3.75. Review will follow.

HUMOR OF THE LAW.

A counsel had been cross-examining a witness for some time with very little effect, and had sorely taxed the patience of the judge, the jury, and every one in court. At last the judge intervened with an imperative hint to the learned gentleman to conclude his cross-examination. The counsel, who received this judicial intimitation with a very bad grace, before telling the witness to stand down, accosted him with the parting sarcasm: "Ah, you're a clever fellow, a very clever fellow! We can all see that!" The witness, bending over from the box, quietly retorted, "I would return the compliment if I were not [on oath!']

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACTION—Joinder of Causes.—A declaration, joining a cause of action by a married woman for the publication of a false statement as to her separate real estate with account for damages to both husband and wife by a false statement as to the wife personally, is bad on demurrer.—Ricardo v. News Pub. Co., N. J., 62 Atl, Rep. 301.

2. ACTION—Misjoinder of Causes.—Where all the counts in a complaint state causes of action on contract, the complaint was not demurrable for misjoinder of causes of action.—Armour Packing Co. of Louisiana v. Vietch-Young Produce Co., Ala., 39 So. Rep. 680.

3. ACTION—Proceedings Stayed Pending Accounting.—Certain action on a claim of a firm against plaintiff stayed pending an accounting to ascertain the amount due plaintiff from a member of the firm, which plaintiff was entitled to offset against such claim.—Kirkwood v. Smith, 95 N. Y. Supp. 926.

4. ADOPTION—Inheritance by Adopted Children.—Where a man adopts a child of a deceased child and dies intestate, the adopted child inherits as a child only, and not as both child and grandchild.—Morgan v. Reel, Pa., 62 Atl. Rep. 253.

5. AGRICULTURE—Cropping Contract.—Where a cropper had completed a contract of labor save that part of the crop remained ungathered and was seized by the sheriff under process against her landlord, held error to dismiss her action to foreclose her laborer's lien on the ground that the contract of labor had not been completed by plaintiff.—Lewis v. Owens, Ga., 52 S. E. Rep. 333.

6. ANIMALS—Vicious Dogs.—Where a plaintiff on a street was bitten by defendant's dog, held that it was necessary for defendant, to escape liability, to show that the animal had always been kind and never attempted to bite any one.—Bentz v. Page, La., 39 So. Rep. 599.

7. APPEAL AND ERROR—Amendment as to Form of Action.—Where the report states that if it becomes necessary plaintiff may amend by substituting his wards, by whom alone the action can be maintained, the case will be treated as having been properly amended.—Mee v. Fay, Mass., 76 N. E. Rep. 229.

8. APPEAL AND ERROR—Assignment of Error.—Assignment of errors based on rulings as to admission of evidence are waived when not urged in the brief.—Cochran v. Cochran, Minn., 105 N. W. Rep. 163.

9. APPEAL AND ERROR—Dismissal.—Appeals from two judgments of the register of wills, one removing an administrator and the other appointing another in his stead, will not be dismissed, under Rev. Code 1893, p. 673, ch. 89, § 15, for failure to file separate transcripts.—Boyd v. Cloud, Del., 62 Atl. Rep. 294.

10. APPEAL AND ERROR—Exclusion of Proffered Evidence.—An offer to prove held to present no question as to the correctness of the ruling excluding the testimony, where there was no question asked to elicit the testimony excluded.—Indianapolis & M. Rapid Transit Co. v. Hall, Ind., 76 N. E. Rep. 242.

11. APPEAL AND ERROR—Exercise of Discretion in Granting Continuance.—The denial of a motion for a continuance by the trial court will not be reversed by an appellate court unless a palpable abuse of judicial discretion is clearly and affirmatively shown by the record.—Supreme Lodge K. P. v. Lipscomb, Fla., 39 So. Rep. 637.

12. APPEAL AND ERROR—Findings of Fact.—Where a married woman sued for an assault with insulting language, and the evidence was conflicting, the finding of the trial judge will not be disturbed.—Parricoui v. Greco, La., 39 So. Rep. 599.

13. APPEAL AND ERROR—Harmless Error.—Where defendant had the benefit of a defense set forth in a plea, the error in sustaining a demurrer thereto was harmless.—Alabama Consol. Coal & Iron Co. v. Turner, Ala., 39 So. Rep. 608.

14. APPEAL AND ERROR—Harmless Error.—Where an issue of breach of warranty in a sale was found in favor of defendant, the admission of certain evidence on such issue, if error, held harmless.—Gadsden Distilling Co. v. Kennedy Stave & Cooperage Co., Ala., 39 So. Rep. 622.

15. APPEAL AND ERROR—Harmless Error.—Where plaintiff wholly failed to make out a case, he was not prejudiced by instructions given, or by remarks of the trial judge to the jury when they returned for further instructions.—Yates v. Huntsville Hoop & Heading Co., Ala., 39 So. Rep. 647.

16. APPEAL AND ERROR—Questions of Fact.—Where it is impossible to say that reasonable men might differ in their judgment on the question of contributory negligence, the supreme court will not disturb a verdict for plaintiff—Norfolk & W. Ry. Co. v. Spencer's Adm'x, Va., 52 S. E. Rep. 310.

17. APPEAL AND ERROR—Reference to Evidence in Record.—Where the place in the record where a contract was set out was not correctly pointed out to the supreme court, the latter would not search the record to find the same.—Armour Packing Co. v. Vietch-Young Produce Co., Ala., 39 So. Rep. 680.

18. APPEAL AND ERROR—Waiver of Grounds for Review.—A party waives causes assigned in his motion for a new trial by failing to refer thereto in his brief on appeal.—Capital Nat. Bank v. Wilkerson, Ind., 76 N. E. Rep. 258.

19. ATTORNEY AND CLIENT—Action for Services.—In an action for attorney's services, it was error for the court to refuse to charge that, if an agreement was made for all the services, the jury could not charge defendant with a greater amount than that agreed on.—Fuller v. Stevens, Ala., 39 So. Rep. 623.

20. BANKRUPTCY—Debts Entitled to Priority.—A provision of a lease that in case of the bankruptcy of the lessee the rent for the unexpired term shall become due and payable at once, and the landlord may proceed as in case of breach, held not to entitle the landlord to priority for the rent of the unexpired portion of the term, under Bankr. Act July 1, 1898, ch. 541, § 64b (5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448].—*In re* Winfield Mfg. Co., U. S. D. C., E. D. Pa., 140 Fed. Rep. 185.

21. BANKRUPTCY—Discharge.—A debt created by fraud of bankrupt acting in his individual capacity, not having been reduced to judgment, held released by his discharge in bankruptcy.—Jewett Bros. & Jewett v. Bentson, S. Dak., 105 N. W. Rep. 173.

22. BANKRUPTCY—Fraudulent Conveyances.—In a suit by a trustee in bankruptcy to recover property purchased by the bankrupt and conveyed to his wife, certain evidence held too remote on the issues of financial condition at that time and of his intent.—Clark v. Mulcahy, Mass., 76 N. E. Rep. 236.

23. BANKS AND BANKING—Collection of Check.—Cus-

tom authorizing bank to which check is sent for collection to send it to the drawee bank for collection held unreasonable and void.—Farley Nat. Bank v. Pollock & Bernheimer, Ala., 39 So. Rep. 612.

24. BANKS AND BANKING — Deposit by Receiver of Debtor.—Where a bank, a creditor of an insolvent estate, received a deposit of funds from the receiver, it could not apply such funds on its claims, nor set off the claims against the deposit.—State v. Corning State Sav. Bank, Iowa, 105 N. W. Rep. 159.

25. BENEFIT SOCIETIES—Anticipating Defenses.—It is unnecessary for the plaintiff in an action upon an insurance policy to anticipate defenses and negative them in his declaration, and, even though the plaintiff should do so, it does not shift the burden of proof. — Supreme Lodge K. P. v. Lipscomb, Fla., 39 So. Rep. 637.

26. BENEFIT SOCIETIES—Beneficiaries.—An attempted change of beneficiary in a mutual benefit certificate not signed by two witnesses, as required by rules of the society, held ineffectual. — Abbott v. Supreme Colony United Order of Pilgrim Fathers, Mass., 76 N. E. Rep. 234.

27. BENEFIT SOCIETIES—Beneficiaries.—Fraternal insurance may be made payable to a stranger for the benefit of relatives or persons dependent on insured.—Mee v. Fay, Mass., 76 N. E. Rep. 229.

28. BILLS AND NOTES—Pleadings. — Where issue was taken on a replication alleging that the bond sued on was given in settlement of certain controversies, plaintiff, on proof of such allegation beyond dispute, held entitled to judgment thereon. — Union Fertilizer Co. v. Johnson, Ala., 39 So. Rep. 684.

29. BOUNDARIES — Description. — Where a line was actually run by the surveyor, and was marked, and a corner made, the party claiming under the patent or deed will hold accordingly, notwithstanding a mistaken description of the land.—Hill v. Dalton, N. Car., 52 S. E. Rep. 273.

30. BOUNDARIES—Schools and School Districts.—Acts 1905, p. 31, ch. 11, § 7, in an act establishing a graded school in the town of Kernersville, held in violation of the constitution; it being the apparent purpose of such section to empower the use of all public school funds apportioned to the graded school district to the white schools.—Lowery v. Board of Graded School Trustees in Town of Kernersville, N. Car., 52 S. E. Rep. 267.

31. CARRIERS—Acceptance of Bill of Lading.—Acceptance by a shipper of bill of lading containing a limitation of the carrier's liability held binding on the shipper when the limitation is not illegal, though the shipper was not aware of it.—Atlantic Coast Line R. Co. v. Dexter, Fla., 39 So. Rep. 634.

32. CARRIERS—Crossings.—A street railway company held not guilty of negligence in failing to build a crossing on a level with the rails in a street in process of improvement, to afford the public access to its cars.—Sweet v. Detroit United Ry., Mich., 105 N. W. Rep. 182.

33. CARRIERS—Failure to Furnish Drawing Room Car. —In an action against a carrier for damages from breach of a contract whereby a passenger was entitled to a drawing room in a sleeper, held proper to admit evidence that plaintiff was offered other accommodation. —Ingraham v. Pullman Co., Mass., 76 N. E. Rep. 237.

34. CARRIERS—Messenger Companies.—Knowledge of a messenger company that messengers were employed to carry money held not to render it a common carrier.—Haskell v. Dist. Messenger Co., Mass., 76 N. E. Rep. 215.

35. CARRIERS—Misconduct of Servants.—A carrier is absolutely liable for injuries to a passenger caused by the misconduct of its servants while engaged in the performance of the contract of carriage. — Hayne v. Union St. Ry. Co., Mass., 76 N. E. Rep. 219.

36. CARRIERS—Negligence.—In an action for injuries to a passenger on a street car, defendant's failure to afford him a reasonable opportunity to get into a place of safety before starting the car held not the proximate cause of the injury.—Cumberland & W. Electric Ry. Co. v. Thompson, Md., 62 Atl. Rep. 243.

37. CONSTITUTIONAL LAW—Due Process of Law.—U. S. Const. Amend. 5, providing, among other things, that no person shall be deprived of life, liberty, and property without due process of law, applies only to congressional legislation, and cannot be invoked to affect state legislation.—Barton v. Kimmerly, Ind., 76 N. E. Rep. 250.

38. CONTEMPT—Order to Show Cause.—Service of order to show cause in proceedings to punish for contempt may be served on the attorney of the party in contempt.—Lederer v. Lederer, 95 N. Y. Supp. 934.

39. CONTRACTS—Failure to Perform.—Where a party agrees to place a mill on certain premises, and to run it steadily, except when prevented by unavoidable accident, an abandonment of the work by his employees is not within such provision. — Vale v. Suiter & Dunbar, W. Va., 52 S. E. Rep. 318.

40. CONTRACTS — Illegality. — An accounting or recovery permitted for money parted with on the faith of an unlawful contract is based, not on the contract, but upon a *quantum meruit* disaffirming the contract.—White Star Line v. Star Line of Steamers, Mich., 105 N. W. Rep. 185.

41. CONTRACTS—Specific Performance.—Where a contract for the sale of land requires the vendor to convey a perfect title, the purchaser is not obliged to accept the property so long as an outstanding mortgage remains unsatisfied of record.—Hobart v. Frederiksen, S. Dak., 105 N. W. Rep. 168.

42. CONTRACTS—Unsigned Writing.—A draft of a contract prepared and assented to by the parties as it was made, but never signed as contemplated, is not valid as a parol contract, since it was not intended to be operative until signed.—Fourchy v. Ellis, U. S. C. C., D. Ver., 140 Fed. Rep. 149.

43. CORPORATIONS—Action by Stockholder.—In a suit by a stockholder of a corporation to compel a former director to account for corporate property purchased under mortgage foreclosure, the receiver held a necessary party.—Michel v. Betz, 95 N. Y. Supp. 844.

44. CORPORATIONS — Inspection of Books. — A stockholder should not be refused inspection of the books of the corporation because his holdings are small.—*In re* O'Neill, 95 N. Y. Supp. 964.

45. CORPORATIONS—Partnerships.—An agreement between corporations operating distinct lines of steamers to pool earnings and divide net profits held not to create a partnership.—White Star Line v. Star Line of Steamers, Mich., 105 N. W. Rep. 185.

46. CORPORATIONS — Receivers. — A stockholder of a corporation held not entitled to complain of the receiver's manner of conducting the business of the corporation.—Jordan v. Electrical Supply Co., Iowa, 105 N. W. Rep. 160.

47 COUNTIES—Erection of Court House.—Whether a police jury in undertaking to build a court house on a new site is acting wisely presents nothing on which the supreme court can act, as the discretion vested in the police jury is not subject to judicial control.—Dupuy v. Police Jury of Parish of Iberville, La., 39 So. Rep. 627.

48. COURTS — Jurisdiction of Municipal Court. — The cause of action held not for assault and battery, of which the municipal court has no jurisdiction, but for neglect of a carrier to discharge its duty to a passenger.—Arkin v. Interborough Rapid Transit Co., 95 N. Y. Supp. 913.

49. COURTS—Previous Decisions as Controlling.—The construction to be placed on a statute may be re-examined, notwithstanding former adjudication by divided court, where the interests involved are important. — Hand v. Stapleton, Ala., 39 So. Rep. 651.

50. COURTS — Suits Involving Separate Contracts. — Where, in a suit to determine rights under separate contracts, the issues in respect to each are the same, the clear jurisdiction of a federal court of equity over one of the contracts gives jurisdiction to determine the entire controversy.—Howe & Davidson Co. v. Haugan, U. S. C. C., N. D. Ill., 140 Fed. Rep. 182.

51. CRIMINAL EVIDENCE—Books of Account.—A "ledger book," as distinguished from a particular account or

items therein, held inadmissible.—Armour Packing Co. of Louisiana v. Vietch-Young Produce Co., Ala., 39 So. Rep. 680.

52. CRIMINAL TRIAL—Agreed Statement of Facts.—Where a criminal case was submitted on an agreed statement of facts, it was proper for the court to direct a verdict of guilty, without submitting the credibility of such statement to the jury.—Ligon v. State, Ala., 39 So. Rep. 662.

53. CRIMINAL TRIAL—Bill of Exceptions.—Omissions required to be shown by the record on a criminal appeal could not be supplied by recitals in the bill of exceptions.—Lomineck v. State, Ala., 39 So. Rep. 676.

54. CRIMINAL TRIAL — Deaf and Dumb Defendant. — Where accused was deaf and dumb, allowing the counsel for accused to write down the testimony and give it to his client to read was a proper method of bringing the evidence to his attention.—Ralph v. State, Ga., 52 S. E. Rep. 298.

55. CRIMINAL TRIAL — Instructions.—Where a written request for a charge submitted by accused is given, he cannot complain that the proposition therein should have been elaborated by the court.—Walker v. State, Ga., 52 S. E. Rep. 319.

56. CRIMINAL TRIAL—Reasonable Doubt. — The jury should acquit defendant, unless the state shows his guilt by evidence beyond all reasonable doubt and to a moral certainty, and the court should so charge.—Little v. State, Ala., 39 So. Rep. 674.

57. CRIMINAL TRIAL — Remarks of Prosecuting Attorney.—Where, on objection that statement of district attorney was not sustained by the evidence, the judge instructed the jury not to consider it, the action of the court cured the irregularity.—State v. Gordon, La., 39 So. Rep. 625.

58. CRIMINAL TRIAL—Transcript.—The record proper and all matters properly belonging thereto can be authoritatively evidenced to an appellate court only by a transcript duly certified by the clerk of the court.—Melbourne v. State, Fla., 39 So. Rep. 593.

59. CRIMINAL TRIAL — Verdict Contrary to Law.—A ground of motion for new trial, alleging that the verdict is contrary to a specified part of the charge, means that the verdict is contrary to law.—Milner v. State, Ga., 52 S. E. Rep. 302.

60. DAMAGES—Action for Injuries to Wife.—A husband suing for personal injuries to his wife may recover as damages the value of his services as nurse to his wife.—Louisville & N. R. Co. v. Quinn, Ala., 39 So. Rep. 616.

61. DAMAGES—Physical Examination.—Where plaintiff had consented to a physical examination at defendant's request, it was not error for the court to exclude evidence of plaintiff's refusal to submit to a second examination.—Orlando v. Syracuse Rapid Transit Ry. Co., 95 N. Y. Supp. 898.

62. DAMAGES—Vicious Dogs.—Where plaintiff while on a public street was thrown down and bitten by a dog, and his pecuniary loss was nearly $200, and he suffered pain for several weeks, a verdict for $500 was not excessive.—Bentz v. Page, La., 39 So. Rep. 599.

63. DEEDS—Failure of Consideration.—The failure of a grantee in a deed to pay rent to the grantor, as required by the terms of the deed, is not ground for setting aside the deed.—Parsons v. Crocker, Iowa, 105 N. W. Rep. 162.

64. DISORDERLY HOUSE—What Constitutes.—Those who maintain a place where usurious rates of interest are taken, and where Gen. St., p. 3704, § 7, prohibiting usurious interest is habitually violated, are indictable for keeping a disorderly house.—State v. Dimant, N. J., 62 Atl. Rep. 286.

65. DIVORCE—Fraudulent Transfer to Avoid Alimony.—A wife, after decree dissolving a marriage and awarding her alimony, may sue to set aside a transfer of property by her husband, pending the divorce, with intent to render ineffectual any recovery of alimony by her.—Cochran v. Cochran, Minn., 105 N. W. Rep. 183.

66. DIVORCE—Petition to Set Aside Decree.—The court may exercise the same discretion on an application to file a petition to set aside a divorce decree for fraud as may be exercised on applications to file a bill of review.—Kerans v. Kerans, N. J., 62 Atl. Rep. 805

67. DOWER—Valuation.—Where a husband conveyed his land in his lifetime, the widow's dower would be measured as at the date of his alienation.—Turner v. Kuehnle, N. J., 62 Atl. Rep. 327.

68. ELECTIONS — Contests. — Where the facts appear upon the record in an election contest, the supreme court may determine whether the judgment is correct upon facts.—*In re* Chester County Republican Nominations, Pa., 62 Atl. Rep. 258.

69. ELECTIONS—Registration Lists.—Aldermen of a city held entitled to purge registration lists prepared for a city election by striking therefrom names of persons who were not entitled to vote because of constitutional disqualification of poll tax.—Pace v. City of Raleigh, N. Car., 52 S. E. Rep. 277.

70. ELECTION OF REMEDIES—Restraining Interference With Officers.—Where an action for an injunction to restrain interference with the possession of a *de facto* officer was tried by consent on the answer of the respondent and decided adversely to him, he was not thereafter entitled to prohibition.—Sanders v. Emmer, La., 39 So. Rep. 681.

71. EMINENT DOMAIN—Alteration of Street Grade.—Where a building is erected upon a street line after the establishment of a change of grade therein by the public authorities, the owner of such building is not entitled to damages for the change of grade.—*In re* West Farms Road in City of New York, 95 N. Y. Supp. 894.

72. EMINENT DOMAIN—Interest of Abutter on Highway.—An abutter on a highway who has no interest in the soil of the highway cannot recover damages on account of any interest in the soil in case of the construction of a railroad on the highway.—Keyser v. Lake Shore & M. S. Ry. Co., Mich., 105 N. W. Rep. 143.

73. EMINENT DOMAIN—Property Subject.—A railroad company incorporated under the general law may institute condemnation proceedings to acquire the property of another railroad.—Atlanta & W. P. R. Co. v. B. & A. R. Co., Ga., 52 S. E. Rep. 320.

74. EQUITY—Parties.—Where a bill to settle and determine complainant's rights to water under contracts with a water power company alleges that such contracts are superior to the rights conveyed by a mortgage given by the company, persons alleged to claim an interest in the mortgage are proper parties defendant.—Howe & Davidson Co. v. Haugan, U. S. C. C., N. D. Ill., 140 Fed. Rep. 182.

75. EVIDENCE—Customs and Usages.—If it is customary for agents, in making sales of hotel furnishings, to enter into a covenant that the seller shall not engage in competing business, it is not a matter of which the courts take judicial knowledge.—Sanders v. Brown, Ala., 39 So. Rep. 732.

76. EVIDENCE—Judicial Notice.—The courts will take judicial notice of the charter granted a railroad company by the Secretary of State under the general law.—Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., Ga., 52 S. E. Rep. 320.

77. EVIDENCE—Notes.—As between the immediate parties to a note it may be proved that it was really given by the maker for the accommodation of her husband.—People's Nat. Bank v. Schepflin, N. J., 62 Atl. Rep. 333.

78. EVIDENCE—Object of Mortgage.—Parol evidence is admissible to show the real object of a mortgage, and that it was given for a purpose not disclosed in the condition.—Campbell v. Perth Amboy Shipbuilding & Engineering Co., N. J., 62 Atl. Rep. 319.

79. EVIDENCE—Rebuttal.—Where, in an action for the death of one run over by a railroad train, defendant tendered an issue of suicide, it was competent for plaintiff to offer evidence in rebuttal.—Alabama Great Southern R. Co. v. Guest, Ala., 39 So. Rep. 654.

80. EVIDENCE—Value of Attorney's Services.—An attorney is competent to testify as to the value of his leg a

services without being shown to be familiar with plaintiff's professional attainments and experience.—Fuller v. Stevens, Ala., 39 So. Rep. 623.

81. EVIDENCE—When Admissible in Part.—Where a party offers to prove a number of facts by a witness, as to a large portion of which facts the witness is incompetent to testify, it is not error to exclude all the evidence. —Indianapolis & M. Rapid Transit Co. v. Hall, Ind., 76 N. E. Rep. 242.

82. EXECUTORS AND ADMINISTRATORS—Inventory.—A direct action to set aside claims to property is the remedy, and not a rule asking for another inventory of the succession, or an amendment of the old inventory.—Succession of Kranz, La., 39 So. Rep. 594.

83. EXECUTORS AND ADMINISTRATORS—Pleading in Action Against.—A count held not to state a cause of action against executors; there being no statement of a promise to pay, nor a statement of a delivery of the order on which claim was based.—Haines v. Rogers, N. J., 62 Atl. Rep. 272.

84. EXECUTORS AND ADMINISTRATORS—Settlement and Review.—The oversight and direction of the settlements of estates is in the district courts, and the supreme court will not interfere except upon a clear showing that justice demands it.—Wheeler v. Long, Iowa, 105 N. W. Rep. 161.

85. EXECUTORS AND ADMINISTRATORS—Trustee of Insane Person.—The trustee of an insane person held entitled to administer an estate to which the insane person would have been entitled to administer if competent.—Boyd v. Cloud, Del., 62 Atl. Rep. 294.

86. FRAUD—Duty to Investigate.—One who perpetrated a fraud on another cannot set up as a defense that the defrauded party should have discovered the fraud and protected himself against it.—Turner v. Kuehnle, N. J., 62 Atl. Rep. 327.

87. FRAUD—False Representations.—To entitle one to maintain an action for fraud and deceit, it is sufficient that defendant authorized and caused the false representations to be made.—Keeler v. Seaman, 95 N. Y. Supp. 920.

88. FRAUDS, STATUTE OF—Agreement for Sale of Interest in Business.—An agreement under which complainant advanced money to defendant to be applied toward the purchase of an interest in defendant's property and business construed, and the rights of the parties thereunder determined.— Fourchy v. Ellis, U. S. C. C., D. Ver., 140 Fed. Rep. 149.

89. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—An agreement to pay a debt in consideration of surrender to the promisor of a note given by another for the same held not within the statute of frauds. — Abercrombie v. Fourth Nat. Bank, Ala., 39 So. Rep. 606.

90. FRAUDULENT CONVEYANCES—Property of Trifling Value.—A transfer by a husband to a wife of a calf of trifling value will not be disturbed at the instance of the husband's creditors. — Foreman v. Citizens' State Bank, Iowa, 105 N. W. Rep 163.

91. GOOD WILL—Firm Name. — A firm name is not a part of the good will of a partnership engaged in a business which depends upon the personal attributes of the partners engaged therein.—Read v. Mackay, 95 N. Y. Supp. 985.

92. GUARANTY—Construction of Contract.—The obligation of guarantors is not to be enlarged nor dimin ished by a strained construction.—Delaware County Nat. Bank v. King, 95 N. Y. Supp. 954.

93. GUARDIAN AND WARD—Agreements as to Custody. —A will by the mother of minor children, undertaking to give the custody of the children to another, held a nullity, under Rev. St. 1892, § 2086. — Hernandez v. Thomas, Fla., 39 So. Rep. 641.

94. HOMICIDE—Requested Instructions.—A requested instruction by accused, on trial for homicide defended on the ground of self-defense, which ignored the doctrine of retreat, was properly refused.—Morris v. State, Ala., 39 So. Rep. 608.

95. HOMICIDE—Resisting Illegal Arrest.—The offense which one commits who fires at an arresting officer, attempting an illegal arrest, with a gun, and misses him, when such resistance is unnecessary to defend himself from the illegal arrest, is that of unlawfully shooting at another not in his own defense.—Porter v. State, Ga., 52 S. E. Rep. 283.

96. HOMICIDE—Self Defense.—A son killing another in the defense of his father cannot avail himself of the right of self defense, unless both he and his father were free from fault in bringing on the difficulty. — Morris v. State, Ala., 39 So. Rep. 608.

97 HOMICIDE—Shooting a Pistol into Crowd.—Where accused fires a pistol into a crowd and kills a man, he is guilty of murder, and a charge on either voluntary or involuntary manslaughter was not required.—Smith v. State, Ga , 52 S. E. Rep. 329.

98. HUSBAND AND WIFE — Contracts.—In an action against a husband and wife to restrain a breach of contract made by the husband for himself and wife without her authority, the burden is on complainants to show ratification.—Sanders v. Brown, Ala., 39 So. Rep. 732.

99. HUSBAND AND WIFE—Note by Married Woman.— The law merchant held inapplicable to a note, executed by a married woman for the accommodation of her husband, which she had no power to make.—People's Nat. Bank v. Schepflin, N. J., 62 Atl. Rep. 333.

100. INFANTS—Contract of Employment.—In an action for injuries to a minor servant, a replication alleging disaffirmance of an agreement incidental to plaintiff's contract of employment, by which plaintiff agreed to comply with certain specified rules, held not demurrable.—Alabama Great Southern R. Co. v. Bonner, Ala., 39 So. Rep. 619.

101. INSANE PERSONS—Avoiding Conveyance.—The assignee of a leasehold interest of a lunatic held entitled to judgment in ejectment against the lunatic's guardian; a proper tender of consideration, necessary for rescission of the assignment, not having been made. — Miller v. Barber, N. J., 62 Atl. Rep. 276.

102 INSANE PERSONS—Petition for Removal of Guardian.—Probate court held without jurisdiction to entertain certain petition for removal of guardian appointed for alleged incompetent.—Jacqueth v. Benzie Circuit Judge, Mich., 105 N. W. Rep. 148.

103. INTEREST—Decree.—A decree for the payment of a sum of money after complainant had tendered certain security held only to carry interest from the date of such tender.—Moore v. Durnan, N. J., 62 Atl. Rep. 327.

104. INTOXICATING LIQUORS—Dispensaries.—Act Oct. 1, 1903, p. 443, to establish liquor dispensary in the town of Elba, and board of commissioners for its management, held unconstitutional.—Lee v. State, Ala., 39 So. Rep. 720.

105. INTOXICATING LIQUORS—Illegal Sale. — Where a person sells liquor without a license, and taking the oath prescribed under Pen. Code, § 431, it is not neccessary for the state to show that the liquors sold and named in such section are intoxicating.—Edwards v. State, Ga., 52 S. E. Rep. 319.

106. INTOXICATING LIQUORS—Revocation of License.— Under a city ordinance providing the revocation of a liquor license on conviction of the holder of any violation of law, the clerk of the council must submit evidence of the conviction before action revoking the license.— Carr v. City Council of Augusta, Ga., 52 S. E. Rep. 300.

107. JUDGMENT—Affidavits of Merits.—The affidavit of merits required to prevent an inquest may be served and filed at any time before actual inquest is taken.—Beglin v. People's Trust Co., 95 N. Y. Supp. 910.

108. JUDGMENT—Merger.—Where plaintiff brought an action for damages for injury to baggage, she could not thereafter maintain a separate action for mental anguish occasioned by such injury.—Eller v. Carolina & W. Ry. Co., N. Car., 52 S. E. Rep. 805.

109. JUDICIAL SALES—Place.—Under Laws 1896, p. 129, ch. 124, § 8, all sales made by the sheriff of Choctaw

county in discharge of any of his official duties, whether as tax collector or as sheriff, must be made in the district wherein the lands are situated.—Cramer v. Sides, Miss., 39 So. Rep. 693.

110. JURY—Challenge to Poll.—Where it was contended that certain members of the panel had just before been members of a jury who found a verdict of guilty against another, charged with gaming while playing with defendant, the point should be raised by a challenge to the polls.—Bryan v. State, Ga., 52 S. E. Rep. 298.

111. JURY—Competency of Juror.—A juror who states that he has expressed an opinion as to guilt or innocence of defendant, but that he will try the case on the evidence, held not subject to challenge for cause.—Funderburk v. State, Ala., 39 So. Rep. 672.

112. LANDLORD AND TENANT—Municipal Requirements.—Lessee held bound to obey orders of municipal departments, in accordance with covenant of his lease, although the lease also provided for indemnity to landlord in case of disobedience.—Palmieri v. Antinozzi, 95 N. Y. Supp. 865.

113. LIBEL AND SLANDER—Advertisements.—A card published by defendant insurance agency reciting payment in cash of a fire loss, in contrast to a settlement of the loss by plaintiff's agency, held not libelous.—P. L. Hennessey & Bro. v. Traders' Ins. Co., Miss., 39 So. Rep. 692.

114. LIFE INSURANCE—Assignment to Secure Debt.—Where a life policy had been assigned to secure a debt to claimant's testator, the burden was on claimant to allege and prove an existing debt to entitle her to recover the proceeds of the policy.—Troy v. London, Ala., 39 So. Rep. 713.

115. LIMITATION OF ACTIONS—Personal Injuries.—In an action against a city for personal injuries to plaintiff through falling into a street excavation, defendant held entitled to set up the statute of limitations as a defense to an amended complaint.—Fleming v. City of Anderson, Ind., 76 N. E. Rep. 266.

116. MANDAMUS—Costs and Persons Liable.—The probate judge is properly taxable with costs of *mandamus* proceedings brought to compel him to issue a liquor license which he wrongfully refused on application.—Hudgins v. State, Ala., 39 So. Rep. 717.

117. MASTER AND SERVANT—Defective Appliances.—An employer, while under no obligation to provide the most modern machinery and tools for the use of his employees, must furnish those which are reasonably safe and adapted to the work.—Wolf v. New Bedford Cordage Co., Mass., 76 N. E. Rep. 222.

118. MASTER AND SERVANT—Liability for Act of Servant.—Messenger company held not liable for sum collected by messenger for plaintiff, in absence of showing of negligence of company in selecting messenger.—Haskell v. Boston Dist. Messenger Co., Mass., 76 N. E. Rep. 215.

119. MASTER AND SERVANT—Negligence.—In an action for the death of a locomotive engineer in a collision between his train and another, evidence held sufficient to warrant a finding that there was negligence in failing to put down torpedoes as a warning to deceased.—Norfolk & W. Ry. Co. v. Spencer's Adm'x, Va., 52 S. E. Rep 310.

120. MASTER AND SERVANT—Torts of Servant.—A mining company held not liable for an assault by its general superintendent on a driver of one of its cars while the superintendent was riding on it.—Palos Coal & Coke Co. v. Benson, Ala., 39 So Rep. 727.

121. MASTER AND SERVANT—Violation of Rule.—Where plaintiff, a railroad switchman, was injured by his foreman giving a signal to start the train while plaintiff was between the cars, plaintiff's negligence in violating a rule prohibiting his going between the cars held a mere intervening cause, insufficient to preclude recovery.—Alabama Great Southern R. Co. v. Bonner, Ala., 39 So. Rep. 619.

122 MECHANICS' LIENS—Materials Furnished.—A contractor held not entitled to enforce a contractor's lien for articles not furnished to defendant, left on the job which defendant refused to permit him to remove.—Gates v. O'Gara, Ala., 39 So. Rep. 729.

123. MONOPOLIES—Control of Transportation.—Fact that contract to control traffic between points in different states might be valid as to traffic between points in one of the states held not to protect it from being declared invalid under the Sherman Act.—White Star Line v. Star Line of Steamers, Mich., 105 N. W. Rep. 135.

124. MORTGAGES—Accelerating Debt. Good faith requires that the lender should, before undertaking to enforce the provisions of the deed accelerating the debt for default, afford the borrower a reasonable opportunity to meet his obligations.—Provident Sav. Life Assur. Soc. v. Georgia Industrial Co., Ga., 52 S. E. Rep. 289.

125. MORTGAGES—Bona Fide Purchasers.—Mortgagee for value and without notice should be protected in his rights, notwithstanding infirmities in the transaction between the mortgagor and his grantor.—Parsons v. Crocker, Iowa, 105 N. W. Rep. 162.

126. MORTGAGES—Failure to File Decree.—Failure to record a final decree duly passed and signed by the judge and filed by the clerk does not render subject to collateral attack a foreclosure sale thereunder formally confirmed.—McGregor v. Kellum, Fla., 39 So. Rep. 697.

127. MORTGAGES—Payment.—Mortgages executed to a bank to secure notes "discounted at three months" held to secure notes discounted payable on demand.—Campbell v. Perth Amboy Shipbuilding & Engineering Co., N. J., 62 Atl. Rep. 319.

128. MORTGAGES—Refusal to Confirm Sale.—The refusal to confirm a sale on foreclosure cannot be the basis of an assignment of error, where shortly after the court made an order of confirmation not appealed from.—Pearson v. Helvenston, Fla., 39 So. Rep. 695.

129. MORTGAGES—Rights of Vendor.—Where a vendee who had paid a portion of the price mortgaged his interest, he could not deprive the mortgagee of any of her rights by agreement with the vendor.—McWhorter v. Stein, Ala., 39 So. Rep. 617.

130. MUNICIPAL CORPORATIONS—Advertisements on Fences.—A taxpayer may sue to restrain the use of fences in public parks for advertising purposes.—Tompkins v. Pallas, 95 N. Y. Supp. 875.

131. MUNICIPAL CORPORATIONS—Billboards.—A city ordinance, requiring boards to be constructed not less than 10 feet from the street, cannot be justified as an exercise of the police power.—City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., N. J., 62 Atl. Rep. 267.

132. MUNICIPAL CORPORATIONS—Certiorari.—When a municipal council acts in a judicial capacity, its action is subject to review on *certiorari*.—Carr v. City Council of Augusta, Ga., 52 S. E. Rep. 300.

133. MUNICIPAL CORPORATIONS—Civil Service Law.—Fact of transfer of certain position to the same competitive class as another position held immaterial on the question of the right of the incumbent of the former position to a salary fixed by the board of aldermen.—People v. Tully, Mich., 105 N. W. Rep. 916.

134. MUNICIPAL CORPORATIONS—Common Council.—Act of common council of a city in declaring vacant a seat of one of its members held subject to the supervisory jurisdiction of the supreme court.—Meachem v. Common Council of City of New Brunswick, N. J., 62 Atl. Rep. 303.

135. MUNICIPAL CORPORATIONS—Damages for Change of Street Grade.—Award of commissioners of estimate and assessment of damage for change of grade could not be held erroneous in principle, in view of award made to adjoining parcel of land.—*In re* West Farms Road in City of New York, 95 N. Y. Supp. 894.

136. MUNICIPAL CORPORATIONS—Defective Sidewalks.—The question whether a defect in a sidewalk has existed a sufficient length of time, and under such circumstances, that the city is deemed to have had notice thereof, is a question of fact.—Hendershott v. City of Grand Rapids, Mich., 105 N. W. Rep. 140.

137. MUNICIPAL CORPORATIONS—Ground for Appointment.—The holder of a note given by a municipal corporation for certain property held not entitled to have a receiver appointed to take possession of the property and sell it to pay the note.—Town of Wadley v. Lancaster, Ga., 52 S. E. Rep. 335.

138. MUNICIPAL CORPORATIONS—Legislative Control.—The legislature may, in the exercise of its reserved power, modify or take away these delegated powers conferred on municipalities in whole or in part.—Wilcox v. McClellan, Mich., 105 N. W. Rep. 941.

139. MUNICIPAL CORPORATIONS—Vote of City Council.—A city council may reconsider and annul a vote previously taken at the same meeting.—Stiles v. City of Lambertville, N. J., 62 Atl. Rep. 288.

140. MUNICIPAL CORPORATIONS—What Constitutes Vagrancy.—An ordinance may declare what acts shall constitute vagrancy, within reasonable bounds, limited to a generally accepted meaning of the law on that subject.—State v. McFarland, Minn., 105 N. W. Rep. 187.

141 NEGLIGENCE—Injury to Child.—In an action for injuries to a child by the negligent cutting down of a telephone pole in a street, an instruction held sufficient in the absence of a written request for specific instructions.—Stewart v. Southern Bell Telephone & Telegraph Co., Ga., 52 S. E. Rep. 331.

142. NEGLIGENCE—Nonsuit.—Nonsuit cannot be granted in an action for negligence on the ground of failure to prove want of reasonable care, unless from the evidence no other legitimate conclusion can be reached by the jury.—King v. Zierz, N. J., 62 Atl. Rep. 287.

143. OFFICERS—Restraining Interference With Office.—Injunction will lie to protect the possession of an officer *de facto* against the interference of a claimant where his title is disputed, until the latter establishes his title by proper proceeding.—Sander v. Emmer, La., 39 So. Rep. 631.

144. PARENT AND CHILD—Custody of Child.—Where a husband and wife have separated because unable to agree, and both are equally fit custodians, the father will be awarded the custody of the child.—People v. Sinclair, 95 N. Y. Supp. 861.

145. PARENT AND CHILD—Religious Education.—The father, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege, and, as between him and other relatives of the child, is generally to be preferred.—Hernandez v. Thomas, Fla., 39 So. Rep. 641.

146. PARTNERSHIP — Accounting.—Amount due from surviving partner to one who advances money to deceased partner to engage in firm business, under agreement for profits, etc., held not ascertainable by accounting.—Kirkwood v. Smith, 95 N. Y. Supp. 926.

147. PARTNERSHIP—Construction of Agreement for Sale of Interest.—An agreement under which complainant advanced money to defendant to be applied toward the purchase of an interest in defendant's property and business construed, and the rights of the party thereunder determined.—Fourchy v. Ellis, U. S. C. C., D. Ver., 140 Fed. Rep. 149.

148. PHYSICIANS AND SURGEONS—Right of Osteopaths to Practice.—An osteopathic physician held within certain statutes prohibiting any person from practicing medicine without a certificate from a board of state medical examiners, and imposing a penalty for violation of the act.—Ligon v. State, Ala., 39 So. Rep. 662.

149. PLEADING - Fraud.—The facts constituting fraud, relied on as the basis of a suit to restrain the payment of the balance due contractors for a public improvement, must be particularly pleaded.—Board of Comr's of La Porte County v. Wolff, Ind., 76 N. E. Rep. 247.

150. PLEADING—Refiling Pleas.—Where plaintiff filed a second count after special pleas, which count was merely a repetition of the first, it was not necessary that the pleas should be refiled to apply to such count.—Gutta Percha & Rubber Mfg. Co. v. City of Attalia, Ala., 39 So Rep. 719.

151. PRINCIPAL AND AGENT—Disclosure of Agency.—Where plaintiff purchased eggs of defendant, it was defendant's duty to disclose the fact that it was acting as agent for another, if such fact existed, in order to escape liability.—Armour Packing Co., of Louisiana v. Vietch-Young Produce Co., Ala., 39 So. Rep. 680.

152. PROCESS—Issue.—The clerk of the city court of Richmond county has no power, without some order of court, to issue more than one process in a suit against a single defendant.—Medical College of Georgia v. Rushing, Ga., 52 S. E. Rep. 333.

153. PROHIBITION—Removal of City Officers.—In attempting to interfere with the action of the council of a city in removing from office officers who are removable by it at pleasure, without notice and without cause, a circuit court acts without jurisdiction.—Campbell v. Doolittle, W. Va., 52 S. E. Rep. 260.

154. QUO WARRANTO — Dispensary Act.—In *quo warranto* proceedings to oust dispensary commissioners, certain pleas, consisting of a general denial and of an allegation that they were acting under an act of the Legislature, held demurrable.—Newman v. State, Ala., 39 So. Rep. 648.

155. RAILROADS—Contributory Negligence.—A defense of contributory negligence held not available to the railroad company where there was a negligent failure of its employees to avail themselves of the last chance to avoid the injury.—Reid v. Atlanta & C. Air Line Ry. Co., N. Car., 52 S. E. Rep. 307.

156. RAILROADS — Duty to Keep Lookout Engine.—Where a locomotive engineer is negligent in keeping a lookout, but afterwards, when it is too late to prevent a collision, discovers an animal upon the track, the railroad is liable for the consequent injury to the animal.—Western Ry. of Alabama v. Stone, Ala., 39 So. Rep. 723.

157. RAILROADS—Persons on Track.—In an action for the death of one run over by a railroad train, it was competent to show the condition as to the frequency and number of persons passing along defendant's tracks at the time and place in question.—Alabama Great Southern R. Co. v. Guest, Ala., 39 So. Rep. 654.

158. RECEIVERS—Custody of Funds.—A receiver, in determining the character of a bank in which he is about to deposit funds of the receivership, must exercise that degree of prudence ordinarily exercised by reasonably cautious men.—State v. Corning State Sav. Bank, Iowa, 105 N. W. Rep. 159.

159. RECEIVERS—Effect of Discharge.—The mere discharge of a receiver of a corporation voluntarily dissolved did not devest him of the property of the corporation which vested in him on his appointment.—Michel v. Betz, 95 N. Y. Supp. 844.

160. RECEIVERS—Liquor License.—The authorities of a city may revoke a liquor license without trial or notice, and the revocation is in the exercise of the executive powers of the municipality, and is not subject to review in *certiorari*.—Carr v. City Council of Augusta, Ga., 52 S. E. Rep. 300.

161. RECEIVERS—Management of Property.—That a receiver operated the plant of the estate at a loss, thereb incurring expenses, did not call for his removal.—Jordan v. Electrical Supply Co., Iowa, 105 N. W. Rep. 160.

162. REFERENCE—Referee's Fees.—Where a referee was appointed under a stipulation, both parties were responsible for his fees.—Keeler v. Bell, 95 N. Y. Supp. 841.

163. REFORMATION OF INSTRUMENTS — Pleadings.—Where defendants in their answer set up a mistake in a deed under which they claim, the court may award a reformation of the deed, although it is not prayed for.—Gwyn-Harper Mfg. Co. v. Cloer, N. Car., 52 S. E. Rep. 305.

164. REMOVAL OF CAUSES—Suit for Specific Performance.—A suit for specific performance of a contract for the sale of lands held to involve a separate controversy with grantees of the land from the vendor, and by whom a conveyance must be made if the relief was granted, and to entitle them to remove the cause.—Elkins v. Howell, U. S. C. C., N. D. W. Va., 140 Fed. Rep. 157.

165. REMOVAL OF CAUSES—Time for Filing Petition.—Where, by the rules of a state court, the time for answering may be extended by stipulation, a petition for removal may be filed at any time within the time so extended.—Sanderlin v. People's Bank of Buffalo, N. Y., U. S. C. C., E. D., N. Car., 140 Fed. Rep. 191.

166. SALES—Failure to Deliver.—As between consignee and consignor the loss of goods by a common carrier, falls on the consignor when the carrier was selected by him to make delivery to the consignee.—Conn v. Reed, Dawson & Co., N. J., 62 Atl. Rep 271.

167. SALES—Retaining Title Till Payment.—The seller of a chattel on condition that title remain in him till the price is paid held not to lose title by recovering judgment for the price.—E. E. Forbes Piano Co. v. Wilson, Ala., 39 So. Rep. 645.

168. SALES—Retention of Title by Vendor. — Reservation of legal title by seller in contract of conditional sale held not to affect his right to recover the agreed price.—Kilmer v. Moneyweight Scale Co., Ind., 76 N. E. Rep 271.

169. SPECIFIC PERFORMANCE — Contract to Purchase Realty.—A decree of specific performance of a contract for the sale of land should comply with the terms of the contract.—Pence v. Life, Va., 52 S. E. Rep. 257.

170. SPECIFIC PERFORMANCE—Performance by Plaintiff.—Time was not of the essence of a contract for the sale of land, as against the vendee, when she had paid a considerable portion of the purchase price and made improvements.—McWhorter v. Stein, Ala., 39 So. Rep. 617.

171. SPECIFIC PERFORMANCE—Time for Performance. —Purchaser's failure to complete contract for sale of land within time specified held not to deprive him of his right to specific performance.—Hobart v. Frederiksen, S. Dak., 105 N. W. Rep 168.

172. STATUTES—Partial Invalidity.—Sess. Laws 1905, p. 325, ch. 66, regulating primary elections, is not rendered invalid as a whole by the unconstitutionality of the provision requiring candidates to pay a fee for the filing of nomination papers.—State v. Drexel, Neb., 105 N. W. Rep. 174.

173. SUBROGATION—Purchaser of Encumbered Property.—Where an intermediate grantor who had assumed a mortgage on the land conveyed the same to a grantee who also assumed the mortgage, such grantor on paying a foreclosure decree, was subrogated to the rights of the holder thereof.—Oglebay v. Todd, Ind., 76 N. E. Rep. 288.

174. SUBROGATION—Vendor's Lien.—A creditor of an estate for whose benefit certain land was sold held subrogated to the vendor's lien of the administratrix to secure the purchase price.—Campbell v. Perth Amboy Shipbuilding & Engineering Co., N. J., 62 Atl. Rep. 319.

175. TAXATION—Property Subject.—The principle that movables follow the person, in matter of taxation, does not embrace bills or notes or other papers taken in the course of business, used and collected here.—Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, La., 39 So. Rep. 601.

176. TAXATION—Redemption from Tax Sale.—Where one seeking to redeem lands from a sale for taxes pays the necessary amount to the probate judge within the redemption period, the postponement by the judge of the issuance of a certificate of redemption until after the time for redemption does not affect the redemptioner's right.—Roach v. White, Ala., 39 So. Rep. 685.

177. TAXATION—Transfer Tax.—Certain property of deceased nonresident could not be offset against the debt of the deceased to brokers, but would be subjected to transfer tax.—*In re* Burden's Estate, 95 N. Y. Supp. 972.

178. TRIAL—Admissibility of Evidence.—In an action for injuries, an objection to a question, asked for the purpose of impeachment, that it was illegal, irrelevant, and immaterial, held properly overruled where a portion of the answer was admissible.—Alabama Great Southern R. Co. v. Bonner, Ala., 39 So. Rep. 619.

179. TRIAL—Burden of Proving Set-off. — Where a set-off was pleaded and really litigated, an instruction, that under the evidence as a whole the burden of proof was on the plaintiff, was properly refused.—Fuller v. Stevens, Ala., 39 So. Rep. 628.

180. TRIAL—Conflicting Evidence.—Where plaintiff testifies to the existence of a debt owing by defendant to him at the time of the trial, defendant is not entitled to the general affirmative charge, notwithstanding contradictory evidence on the question.—Holladay v. Rutledge Ala., 39 So. Rep. 613.

181. TRIAL—Instructions.—Where the judge charged to determine the matters at issue by the evidence, he need not further instruct to determine any one of the issues by the evidence.—Stewart v. Southern Bell Telephone & Telegraph Co., Ga., 52 S. E. Rep. 881.

182. USURY—Estoppel.—Where a lender was informed by the borrower, who was his attorney, that a loan contract drawn by the latter was valid in law, the borrower was estopped to plead that the contract was usurious.—U. T. Hungerford Brass & Copper Co. v. Brigham, 95 N. Y. Supp. 867.

183. VENDOR AND PURCHASER—Failure of Vendor's Title.—Vendee held entitled to recover amount paid on execution of contract, and to enforce a lien therefor because of vendor's inability to convey all the land contracted to be conveyed.—Weiss v. Schweitzer, 95 N. Y. Supp. 923.

184. VENDOR AND PURCHASER—Sufficiency of Title.—Where the purchaser of land incumbered by a mortgage is not a party to foreclosure, an abstract of title does not show a right to convey the property "by warranty deed with abstract showing good title."—Fagan v. Hook, Iowa, 105 N. W. Rep. 155.

185. WATERS AND WATER COURSES — Diversion for Manufacturing Purposes.— A riparian owner has no right to divert water from the stream for manufacturing purposes to such an extent as to deprive a lower riparian proprietor of the natural flow of the stream.—New England Cotton Yarn Co. v. Laurel Lake Mills, Mass., 76 N. E. Rep. 281.

186. WILLS—Ademption.—Where testatrix after bequeathing a legacy during her lifetime paid the amount thereof to the legatee in full satisfaction of the legacy, the legacy was thereby adeemed.—Gallagher v. Martin, Md., 62 Atl. Rep. 247.

187. WILLS—Construction.—A clause in a will, which standing alone will pass a fee, may be so limited by subsequent clauses as to pass a life estate only, or to impose conditions by which, upon certain contingencies, the estate may be entirely defeated.—Wheeler v. Long, Iowa, 105 N. W. Rep. 161.

188. WILLS—Residuary Clause.—Where a contrary intention is apparent, the rule that a residuary clause of a will should be liberally construed is without application.—Mills v. Thompkins, 95 N. Y. Supp. 962.

189. WITNESSES—Husband and Wife.—A husband suing for personal injuries to his wife and infant children may prove by his wife that he employed a nurse for his children.—Louisville & N. R. Co. v. Quinn, Ala., 39 So. Rep. 616.

190. WITNESSES—Impeachment. —It is not reversible error to exclude evidence tending to impeach a witness on an unimportant point.—Bialy v. Krause, Mich., 105 N. W. Rep. 149.

191. WITNESSES—Physicians.—In action for personal injuries, plaintiff held not to have waived his right to object to the incompetency of his own physicians as witnesses for defendant.—Indianapolis & M. Rapid Transit Co. v. Hall, Ind., 76 N. E. Rep 242.

192. WITNESSES—Value of Merchandise.—Circular letters held not prices current and commercial lists within Code 1896, § 1810, relating to prices current as evidence of value of articles.—Kentucky Refining Co. v. Conner., Ala., 39 So. Rep 728.

193. WORK AND LABOR—Amount of Recovery.—One furnishing board and services in the absence of an express contract is entitled to recover their reasonable worth.—Schuchler v. Cooper, Dela., 62 Atl. Rep. 261.